

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER 98-0343P ST

Sales Tax

Period: November 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall Remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about The Department's official position concerning specific issues.

ISSUE

I. Negligence Penalty. – Imposition

Authority: IC 6-8.1-10-2, Conklin Brothers of Santa Rosa, Inc. v. U.S., U.S. Court of Appeals, 9th Circuit, No. 91-16118, 2/23/93, 986 F2d 315

The taxpayer protests the imposition of the 10% negligence penalty.

STATEMENT OF FACTS

The taxpayer is a plumbing, heating, and air conditioning contractor located in northern Indiana. The taxpayer is incorporated as a regular corporation that files as a special corporation.

I. Negligence Penalty. – Imposition

DISCUSSION

The taxpayer protests the imposition of the negligence penalty for late payment of the sales tax return. The taxpayer's protest basis is the taxpayer was the victim of embezzlement and unable to timely pay the sales tax payment.

The perpetrator of the embezzlement was the bookkeeper/office manager. The taxpayer employed the bookkeeper/office manager from mid-1991 to 1998. The bookkeeper/office manager was also designated the Corporate Secretary even though the

bookkeeper/office manager held no stock in the taxpayer. The bookkeeper/office manager reported directly to the president of the taxpayer. The bookkeeper/office manager had total control of the payment system. The bookkeeper/office manager had responsibility for opening mail, processing payment vouchers, signing checks, and reconciling the bank statement. As there was no independent review of the payment system, the bookkeeper/office manager was able to embezzle a large amount of money.

The *Conklin* court case states, “. . . Congress has charged (the company) with an unambiguous duty to file, pay, and deposit . . . taxes, and (the company) cannot avoid responsibility by simply relying on its agent to comply with the statutes.” The *Conklin* court case points out that supervision is the key issue. If the company supervises the agent or employee, the company is not disabled from paying taxes, and, has the obligation to assure taxes are paid.

In the instant case, the president of the taxpayer supervised the bookkeeper/office manager. As such, the taxpayer was obliged to assure taxes were paid.

FINDING

The taxpayer's protest is denied. The president of the taxpayer supervised the bookkeeper/office manager. As such, the taxpayer was obliged to assure taxes were paid. The taxpayer did not act with reasonable care in the filing of the November 1997 sales tax return.